court does not admit the doctrine of parol waiver it nevertheless does oviate the harshness of its former ruling by making it possible to the desired end by a suit in equity to reform the policy in accordance with the parol agreement.

In an article in the *Harvard Law Review* for *March, 1902*, criticising the doctrine laid down in the first decision of the Supreme Court in this case, an attempt was made to justify the doctrine of a parol waiver and to show that it did not violate the parol evidence rule so flagrantly as was supposed. The author argued that a binding contract of insurance is commonly made before the policy is issued; that the policy is merely the reduction of such contract to writing; and that as the limitations upon the agents powers contained in the policy could not affect the contract as previously made it was strained and inequitable to apply the parol evidence rule. The writer seems to have forgotten, however, that the policy must be taken as expressing the final understanding of the parties. *Union Mut. Life Ins. Co. v. Mowry*, 96 U. S. 544. It seems to us to be more logical to follow the tendency of the courts and to frankly admit that in recognizing the parol waiver theory the parol evidence rule is clearly violated and to establish an exception in the case of insurance policies. *Welch v. Association*, (Wis.) 98 N. W. 227; *Spalding v. Ins. Co.*, 71 N. H. 441.

Such an exception seems to be founded on reason and justice and should meet with our approval. It is hard to find any substantial reason why the knowledge by an authorized agent of the company of facts affecting the validity of a policy at its inception should not be considered as the knowledge of the company and the company be estopped to set up such facts to defeat a recovery on the policy. *Robbins v. Springfield Fire Ins. Co.*, 149 N. Y. 484; *Forward v. Continental Fire Ins. Co.*, 142 N. Y. 382. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the "Statute of Frauds," become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. *Vance on Insurance*, p. 358.

EJECTMENT—REMOVAL OF TELEPHONE WIRES.

Ejectment is a form of action by which possessory titles to corporeal hereditaments may be tried and possession obtained. The action lies for the recovery of corporeal hereditaments only and cannot be maintained where the subject matter of the action is incorporeal or intangible; for the latter cannot be delivered in execution by a sheriff and are not subject to entry. These propositions are fundamental. *Sedgwick & Wait, Titles to Land*, Chap. IV. It is also elementry, that in its legal signification land has an indefinite extent upwards as well as downwards, the term including not only the face of the earth, but everything under it or over it as expressed by the maxim *cujus est solum, ejus est usque ad caelum, 2 Blackstone's Com., 18.*

In *Butler v. Frontier Telephone Co.*, 36 N. Y. Law Jour. 1139, the defendant had wrongfully stretched telephone wires across the land of the plaintiff without in any way physically touching the soil. The question presented was whether an action of ejectment would lie. The statutary action of that name in New York where the question arose being practically the same as ejectment at common law. The practical importance of the question being in the fact that there are certain advantages to the plaintiff peculiar to ejectment not to be had in other actions. By the application of the principle *cujus est solum* it was held that ejectment would lie on the ground that there had been an ouster from part of the land. "According to fundamental principles and within the limitation mentioned, space above land is real estate the same as the land itself. The law regards the empty space as if it were a solid, inseparable from the soil, and protects it from hostile occupation accordingly."

The precise question here presented does not seem to have been before decided except as this case was presented to the lower courts. 109 App. Div. 217, Yale Law Journal, Vol. XV, p. 246. A similar question involving the same principle however has frequently arisen where ejectment has been brought because of overhanging eaves or cornices. Under such circumstances it has been held that the action might be maintained. *Murphy v. Bolger*, 60 Vt. 723; *McCourt v Eckstein*, 22 Wis. 153. This was denied however in *Aiken v. Benedict*, 39 Barb. 400, upon the ground that the defendant had taken possession of nothing of which the sheriff could put the plaintiff in possession. The question was not discussed at length in any of these cases.

The doctrine upon which the decision in the present case is based namely, that land embraces the space above and the soil beneath the surface of the ground, is undisputable. But has not the court in the present instance unwarrantably extended this doctrine when it says that the law regards the empty space as a solid inseparable from the soil? Is it not more in accord with reason and common sense that the principle *usque ad caelum* means that the owner of land has a right in the nature of an incorporeal hereditament? Corporeal property signifies property in possession. By possession is meant physical dealing; consequently there can be no actual possession of anything which is intangible. An owner of land cannot physically possess the space above it any more than he can physically possess an easement or a servitude. If then, as clearly seems to be the case, the incidental right to the space above one's lands is an incorporeal hereditament, it is difficult to see how an action of ejectment may be maintained when another appropriates this space to his own use. The proper redress could be had by an action on the case or by a proceeding to abate a nuisance.

It has been repeatedly laid down that ejectment will not lie for anything of which a sheriff cannot deliver possession, the subject matter must be something tangible, something which can be delivered. *Child v. Chappell*, 9 N. Y. 246. In *Jackson v. May*, 16

Johns. 184, it was said that ejectment would only lie for something attached to the soil. In an early case it was held that such an action would not lie for a water course or rivulet though its name be mentioned, because it would be impossible to give execution of a thing which is transient and always running. *Adams on Ejectment*, 18. Such possession as is required can be given of mines, quarries and upper rooms in a house, because in each of these cases there is something which may be physically possessed. But a sheriff can no more deliver such possession of obstructed space by removing the obstructions as suggested by the present decision, than he can give physical possession of an easement by removing a nuisance which interferes with its enjoyment.

POLICE POWER—CONSTITUTIONAL LAW—REGULATION OF EXPRESS COMPANIES.

In view of the many important enactments, state and Federal, of late years, prohibiting discriminations in rates and service by public service corporations, and which have been upheld by the courts, the recent holding of the Supreme Court of Indiana in the case of *American Express Co. v. Southern Indiana Express Co.* (78 N. E. Rep. 1021), is perhaps in line with the weight of authority on this point.

The statute of Indiana (Acts 1901, p. 149), provides that express companies shall grant to all consignors, including other responsible express companies as consignors, equal terms and accommodations in the carriage and continuance of carriage of goods and prohibits them from granting to any one carrier any privileges or accommodations not granted to all others.

The case under discussion arose on a statutory remedy of injunction sought by the appellee for a violation of the above statute, and upon the hearing the act was declared a valid exercise of the police power and not violative of the fourteenth amendment of the Federal Constitution on the ground that it is an attempt to deprive an express company of its rights and to take its property without due process of law; and further, that it attempts to take from an express company the common law right to contract. Although the court does not enter into a discussion of the police power of the state, its decision is fully sustained by the decisions of the same and other courts.

"Great interests which have grown up and which closely and seriously affect the commercial convenience and prosperity of all the people of the state.—interests which, in their present form and dimensions, were unknown to the common law—are both proper and necessary subjects of police protection, regulation and control. It cannot be safely admitted that these vast and powerful agencies, by and through which a large part of the carrying trade of the people of the state is conducted, are beyond the control of the legislature. The well-being of the people demands that they shall at all times be subject to the rein and curb of the law, and that their methods of conducting their business must